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No. 86-1168

In The
SUPREME COURT
OF THE UNITED STATES

October Term, 1986

AVIS SCHMIDT,

Petitioner,

v

DAVID GREINER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner's statement of the question implies that Petitioner did not receive any form of pre-termination due process which Respondent believes is contrary to the opinion of the court below. Accordingly, Respondent would restate the question as follows:

WAS THE RESPONDENT'S QUALIFIED "GOOD FAITH" IMMUNITY DEFENSE PROPERLY UPHELD BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS WHERE GREATER PRE-TERMINATION HEARING RIGHTS THAN THOSE RECEIVED BY THE PETITIONER WERE NOT CLEARLY ESTABLISHED BY MAY, 1981 WHEN PETITIONER WAS DISCHARGED?

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, David Greiner, prays that this Court will deny the writ of certiorari sought by Petitioner, Avis Schmidt.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, filed September 26, 1986, appears at page App. 1 of the Appendix to the petition filed by Petitioner. The judgment and opinion of the United States District Court, Western District of Michigan, filed July 22, 1985, appear at pages App. 2 and 3, respectively, of the Appendix to the petition for writ of certiorari.

JURISDICTION

Respondent agrees with Petitioner's assertion that jurisdiction in this matter is controlled by 28 USC 1254(1). As is discussed more fully in our argument, however, Respondent contends that this Court should decline to exercise said jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent agrees with the statement of constitutional and statutory provisions as set forth at page 2 of the petition for certiorari filed by Petitioner.

STATEMENT OF THE CASE

Petitioner was an employee of the Michigan State Housing Development Authority (hereinafter "Housing Authority"), an agency of the State of Michigan within the Department of Commerce. Petitioner was separated from her employment with the Housing Authority on May 26, 1981, effective May 12, 1981. Stemming from said separation the Petitioner filed three actions. First, a post-termination grievance proceeding was held before the Michigan Department of Civil Service with an appeal of part of the Civil Service decision to the Ingham County Circuit Court, which resulted in Petitioner being reinstated to her position with the Housing Authority and awarded full back pay and benefits. Second, an action was filed in the Michigan Court of Claims against the Housing Authority for interest on the back pay award and attorney fees for the Civil Service hearing; Petitioner dismissed this action. Third, Petitioner filed the present action in the United States District Court, Western District of Michigan, against her immediate supervisor, David Greiner (hereinafter "Respondent"), seeking damages based upon 42

USC 1983, claiming that Respondent failed to give her notice or a pre-termination hearing of any kind, and that said omission deprived Petitioner of her property (employment) without due process.

On April 30, 1985, Respondent filed a motion for summary judgment, setting forth two arguments; first, that Petitioner was given notice and an opportunity to respond prior to separation sufficient to satisfy pre-termination due process requirements, and second, that the Respondent is immune from suit under the doctrine of qualified "good faith" immunity.

On July 22, 1985, the District Court filed an opinion and order granting Respondent's motion for summary judgment based upon the second contention that Respondent was entitled to a "good faith" immunity defense, relying principally upon the Court's finding in *Davis* v *Scherer*, 468 US 183; 104 S Ct 3012; 82 L Ed 2d 139 (1984).

On August 16, 1985, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. On September 2, 1986, after reviewing the record, briefs and hearing oral argument, the Court of Appeals in a *per curiam* opinion affirmed the judgment for the reasons set forth in the District Court's opinion.

COUNTERSTATEMENT OF FACTS

It is Respondent's belief that the statement of facts as set forth by Petitioner contains numerous items that are not relevant to the issue to be considered by this Court; therefore, Respondent offers this Counterstatement of Facts.

During the afternoon of May 12, 1981, Petitioner left her place of employment with the Housing Authority for a

doctor's appointment and did not return. On May 14, 1981, Petitioner had delivered to her immediate supervisor, Respondent, a doctor's slip dated May 12, 1981, and a note dated May 14, 1981, stating that for medical reasons she would be off work until May 25, 1981, a period of two weeks. Petitioner had also previously scheduled a three-week vacation which was to begin on May 26, 1981, and end on June 15, 1981. Thereby Petitioner would be off work a total of five consecutive weeks. At the time Petitioner left work on May 12, 1981, she had only 24.9 hours of accrued sick leave available for her use, enough for approximately three days of sick leave; yet Petitioner requested two and one-half weeks of sick leave.

On May 15, 1981, Respondent sent Petitioner a letter stating: (1) that he needed certain required medical information before he could make a decision regarding her leave; (2) that the state of her health was having an effect on her ability to function satisfactorily in her position; and (3) that they should discuss these matters on the morning of May 19,1981.

Petitioner failed to provide the necessary medical information and also failed to discuss the matters concerning her absence with Respondent, or even to contact him on May 19, 1981. Petitioner contends she contacted the Housing Authority on May 18 and 19, 1981, and left messages with two other employees of the Housing Authority for Respondent to call her. Respondent contends he did not receive a phone message from Petitioner.

On May 21, 1981, after not receiving any further explanation from Petitioner as to her absence since her note of May 14, 1981, and after she had been off work for over a week without an approved leave or accumulated sick leave hours sufficient to cover the time period, Respondent sent a mailgram to Petitioner stating that her sick leave request

was disapproved, her previously approved annual leave was rescinded, and that she should report to work on May 26, 1981, at 8:00 a.m.

Petitioner failed to report to work on May 26, 1981; instead, she had delivered another doctor's slip which did not contain any of the requested medical information.

Failing to receive any substantive information on Petitioner's illness and Petitioner's failure to discuss the problem or to come to work as directed, Respondent consulted with the Personnel Department and the then-Executive Director of the Housing Authority as to what course of action to take. Upon obtaining their concurrence, Respondent, on May 26, 1981, sent a certified letter with attachments to Petitioner stating: (1) that her many health problems and resulting illness leaves of absence had had a detrimental effect on the functioning of the Audit Unit; and (2) as a result, the Housing Authority could no longer approve any additional illness leaves of absence, and therefore she would be separated based upon leave of absence denied.

Petitioner filed a grievance on her separation against the Housing Authority, pursuant to the post-termination civil service grievance procedure established by the Michigan Department of Civil Service. The grievance was processed through a full evidentiary hearing and an appeal before the Ingham County Circuit Court, with the result that Petitioner was reinstated to her position with the Housing Authority on June 1, 1982 and awarded full back pay and benefits.

REASONS FOR DENYING THE WRIT

Petitioner has asserted that this Court should grant a writ of certiorari in this case because this Court's decisions in

Davis v *Scherer, supra*, and *Harlow* v *Fitzgerald*, 457 US 800: 102 S Ct 2727; 73 L Ed 2d 396 (1982) need to be clarified. Petitioner is arguing in essence that, because the decisions in the above cases are unclear, the District Court and the Court of Appeals in the present matter misapplied the holdings set forth therein to the detriment of Petitioner. These assertions by Petitioner, we contend, simply are not correct.

I.

THE DECISION BY THE DISTRICT COURT AS AFFIRMED BY THE COURT OF APPEALS IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

The District Court relied principally on the holding in *Davis* in deciding that Respondent was entitled to a "good faith" immunity defense. The factual situation in *Davis* is very similar to the factual situation in the present case. In *Davis*, Plaintiff Scherer was discharged from his position with the Florida Highway Patrol when he refused to resign his part-time employment as a reserve deputy with a county sheriff's office. When Scherer refused to resign, a series of oral discussions and an exchange of letters between Scherer and his superiors ensued concerning the various parties' reasons why Scherer should or should not resign his part-time employment. Scherer was subsequently notified that he had been discharged from his position with the Florida Highway Patrol.

This Court held that Scherer's superiors were entitled to "good faith" immunity because it was not unreasonable for them to conclude that Scherer had been provided with the fundamentals of due process as a result of the series of communications which informed him of their objection to his part-time employment and provided him several opportunities to respond. *Davis, supra*, 468 US at 192.

The District Court properly determined that a similar conclusion was warranted in the present case:

> "*Taking all the evidence of record in a light most favorable to plaintiff, the Court concludes that it was not unreasonable for defendant to believe that the series of letters he exchanged with plaintiff were adequate to satisfy due process requirements.* Those letters advised plaintiff that additional documentation was needed before her sick-leave request could be approved and invited plaintiff to meet with defendant on May 19th to discuss her vacation schedule and request for sick-leave. Plaintiff did not accept that invitation and, after being advised of the denial of her sick-leave request, did not report to work on May 26th as directed by defendant, nor did she appear to explain why she should not be required to report to work on that date. Because it was not clearly established by May, 1981 that plaintiff was entitled to greater pretermination due process protections than these, *see Davis v. Scherer*, 104 S.Ct. at n.10, defendant Griener [sic] is entitled to prevail on his 'good faith' immunity defense." [Judge Gibson's opinion of July 22, 1985. See Petitioner's Appendix, pp App. 7 and 8.] (Emphasis supplied.)

Petitioner attempts to draw a distinction between *Davis* and the present case by stating that this Court in *Davis* found that Scherer had a real opportunity to be heard, while the District Court in the present case determined that Petitioner had no real opportunity to present reasons why she should not be terminated. [See petition for writ of certiorari, p 17.]

It is difficult to see Petitioner's distinction in that a review of the facts of both cases indicates that neither Scherer nor Petitioner herein were on notice that their

conduct would lead to their terminations prior to the actual notice of said terminations and, therefore, neither had an opportunity to present reasons why they should not be terminated. What the courts did determine, however, was that both Scherer and Petitioner herein were aware of the issues that led to their terminations and, in fact, were both requested and given an opportunity to respond to their superiors thereon.

Based upon the objective reasonableness of the superiors' conduct as determined by the courts in *Davis* and the present case, i.e., the discussions and correspondence between the parties on the underlying issues that caused the terminations, coupled with the lack of clearly established law that Scherer or Petitioner were entitled to greater pre-determination due process protections at the time of their discharge than was afforded them, the courts determined that Scherer's employers and Respondent herein were, nevertheless, properly entitled to prevail on a "good faith" immunity defense.

While Petitioner urges this Court only to clarify its decision in *Davis*, Respondent suggests that Petitioner is actually seeking a reversal of said decision. Petitioner argues that since her right to some form of a pre-termination opportunity to present reasons why she should not be terminated were clearly established in May, 1981, the Respondent's conduct violated "clearly established law" and he was therefore not entitled to a qualified immunity. [See petition for writ of certiorari, p 18.] On the contrary, such alleged pre-termination rights were not clearly established at the time of Petitioner's discharge in May, 1981, as evidenced by the inability of the Fifth Circuit Court of Appeals in *Davis* and a U.S. District Court within the Sixth Circuit in *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1487; 84 L Ed 2d 494 (1985), to come to that conclusion. This contention will be more fully discussed in our second argument.

Accordingingly, we contend the decision of the District Court as affirmed by the Court of Appeals is entirely consistent with the decision reached by this Court in the *Davis* case.

II.

THE REQUIREMENT THAT PRE-TERMINATION HEARINGS WERE REQUIRED PRIOR TO DISMISSAL WAS NOT CLEARLY ESTABLISHED WITHIN THE SIXTH CIRCUIT AT THE TIME OF PETITIONER'S TERMINATION.

In addition to the above reasons for denying the writ, a futher reason, not specifically addressed by the District Court, is that the requirement of pre-termination hearings was not clearly established within the Sixth Circuit in May, 1981.

The fact that the law was unsettled may be demonstrated by comparing this case with *Cleveland Bd of Educ* v *Loudermill, supra*, especially the decision at the District Court level, *Loudermill* v *Cleveland Bd of Educ*, 721 F2d 550 (6th Cir, 1983). The *Loudermill* case presented facts very similar to the alleged facts in the present case; both plaintiffs were classified civil servants. The time frame of events is also very similar; the discharge of Loudermill occurred in November, 1980, just six months prior to the separation of Petitioner herein.

The United States District Court for the Northern District of Ohio dismissed Loudermill's 42 USC 1983 action for failure to state a claim upon which relief could be granted, holding that while Loudermill enjoyed a cognizable property interest in continuing employment, due process did not require a pre-termination hearing. (see *Loudermill*, 721 F2d 550, 553.)

Although the district court's holding was subsequently overturned by the Sixth Circuit Court of Appeals and affirmed by this Court, it is obvious that it was not clearly established within the Sixth Circuit prior thereto that pre-termination hearings are required for due process purposes. This is especially true considering that when a United States District Court within the Sixth Circuit, where the present case also arises, although requested to rule on the question, could not come to the conclusion that pre-termination hearings were required.

Further, under the standard set forth in *Harlow*, *supra*, for determining whether an official is entitled to a grant of immunity, namely, whether the official's conduct at the time it was undertaken violated "clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, *supra*, 457 US at 818, it would be difficult to conclude that it was reasonable for Respondent herein, an intermediate supervisor untrained in the law, to be required to know that pre-termination hearings were required prior to separation of a classified civil servant, when a United States District Court, after reviewing the available law on the subject, could not come to that conclusion. Accordingly, we contend that the requirement of pre-termination hearings was not clearly established or could not reasonably have been known by Respondent at the time of Petitioner's termination in May of 1981, and thus Respondent is entitled to prevail on a good faith immunity defense.

CONCLUSIONS AND RELIEF SOUGHT

Wherefore, Respondent respectfully prays that this Court will deny certiorari.

Respectfully submitted,
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